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## FISCAL IMPACT REPORT

ORIGINAL DATE 2/7/07

SPONSOR Ingle LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Contributions to State Agents & Candidates SB 400

ANALYST Wilson

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY07	FY08	FY09	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Total</b>		\$0.1	\$0.1	\$0.1	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to SB 445

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Offices of the District Attorneys (AODA)  
 Corrections Department (CD)  
 Office of the Attorney General (OAG)  
 State Investment Council (SIC)

### SUMMARY

#### Synopsis of Bill

Senate Bill 400 prohibits payments, campaign contributions or any other form of gifts exchanged between managers, their employees or representative agents and investors of public funds as well as anyone seeking, currently engaging, or wishing to engage at a later date in business with state investment agencies and any other "state agent", namely, elected or appointed officials with any influence on the state's investment process, including, but not limited to: Governor, Lt. Governor, State Treasurer, State Auditor, Secretary of State, Attorney General, Land Commissioner and State Legislators.

The SIC interprets the bill to affect the SIC, as managers of New Mexico's Permanent Funds; the State's public pension funds of PERA & ERB; the State Treasurer; and the New Mexico Finance Authority, as well as the Governor, Legislature and New Mexico's elected officials.

## FISCAL IMPLICATIONS

SB 400 imposes additional enforcement authority on the OAG without providing any appropriation. The OAG may need additional staff and resources to enforce the provisions of SB 400.

The bill will create a new felony offense; it is likely that criminal prosecutions will be relatively rare. Therefore, the impact on the courts, district attorneys and public defenders will not be significant.

## SIGNIFICANT ISSUES

SB 400 could have significant impact on the available pool of broker dealers and investment opportunities for all of the state's investment agencies. If any employee of any broker dealer, manager or advisor makes a campaign contribution to a "state agent" as defined in the bill, the broker is barred from conducting business with all state agencies.

From the bill: *"investment agent" means a person that receives or the person's officers or agents that receive, compensation for providing financial services involving public money or that invest or provide advice on the investment of public money.*"

The SIC interprets this definition to include all money managers, financial advisors, investors, and brokers as well as *any employee* of a finance/investment related company which may have current, past or future dealings and/or business relationships with the state. By defining the company itself as inclusive of all its individual employees, the following becomes likely:

An administrative assistant for Financial Services Company X in Albuquerque contributes \$20 to her state legislator's reelection campaign. Company X, which is a huge multi-national corporation based in New York, is on the approved bond trading list for the SIC. The SIC doesn't execute trades with anyone Company X's Albuquerque branch, but with the NY office. However, under SB 400, because the assistant is technically an employee of Company X, the corporation will be prohibited from doing business with the State, regardless of its location.

Under SB 400, the state and its investment arms will essentially be barred from working with any local banks or banks with local branches, in fear that a bank employee, even of lowest rank, might contribute to his or her candidate of choice for state elected office, thus bringing the investment agent and candidate into felonious violation of the statute.

SB 400 will also trigger a significant depletion of qualified investment professionals and firms for the state to partner and work with, as detailed above.

In addition, there is no time frame to indicate when a departing employee might be able to work for a company that has ever been employed as an investment agent for the state. Investing and finance are fields that are extremely specialized and experience specific. Such relevant experience is valued in finance, just as it is with any other professional field. It hardly seems fair to prevent a former state employee in this field from having to exclude all investment agents who work on behalf of any state investment agency from a list of potential employers, which will include an extremely long list of major banks, investment agencies, advisors, financial groups and the like. Using this same logic, private sector financial agencies in NM will be forced to

look outside our state to recruit employees, should they wish to do any business with the State.

## **ADMINISTRATIVE IMPLICATIONS**

The bill's wide and in several cases undefined scope leaves open the question of who will monitor and police contributions for potential conflict. The SIC, and other state investment agencies, has neither the staff, nor expertise to cross reference campaign reports with hundreds of broker agents and their thousands of employees. The time and monetary cost of such endeavors is difficult to quantify.

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

SB 400 relates to and somewhat conflicts with SB 445. SB 445 defines "public officer or employee" differently than SB 400.

## **TECHNICAL ISSUES**

The SIC states that the bill as drafted has several critical flaws that will hinder the ability of the state's investment agencies to fulfill their missions, and prevent them from exercising their statutory obligation to be prudent investors. They provided the following;

First, in section C of definitions, "contribution" is defined extensively, including "...any other thing of value". This definition is so broad that among other things, it will include presentation packets, marketing materials, binders, notebooks, CDs, presentation flash-drives or any other materials often submitted during a standard Request for Proposal (RFP) process, as well as being relied upon by the investment agencies to make prudent investment decisions.

Section C (2) excludes as gifts, "...compensation for services rendered or capital invested that is: ... (b) Commensurate with the value of service rendered or the magnitude of the risk taken on the investment;" This language is ambiguous and confusing, and might lead one to believe that "riskier" investments somehow allow for higher compensation.

Section C (5) excludes as gifts, "food and refreshments totaling no more than twenty five (\$25) per day for food and refreshments at a public reception or other public social function that are available to all guests equally;" Lack of specificity regarding a "public reception" and "public social function" will lead to confusion. What exactly does "public" mean? How many people and/or state agents must be present for it to constitute a "public social function?" Will it only be applicable for events open to all members of the general public, or will it simply include meetings in a public place? What if the dinner was held at a country club or private facility?

Limited partner meetings are open only to a Fund's limited partners who have invested in a Fund. It is often critical for investment agencies to attend these meetings to evaluate performance, though these meetings are rarely "public".

Section F defines "investment agent" as: "...a person that receives or the person's officers or agents that receive, compensation for providing financial services involving public money or that invest or provide advice on the investment of public money;"

This broad definition seems to include all employees, contractors, and board members affiliated with those public funds or providing investment advice to the state.

Section K defines “state agent” as “...a person who is acting in an official capacity...” and is the Governor, Treasurer, a legislator, etc. However, “acting in an official capacity” is not defined. Is a state agent in an official capacity every waking moment, or is it related to specific duties during the work day?

Section 2 of the bill, “Solicitation and Acceptance of Contributions Prohibited”, says it is a felony for “...anyone who solicits funds on the candidate’s behalf to knowingly solicit or accept, directly or indirectly, a contribution from an investment agent doing business with a state agent.”

The first problem with this section will be the lack of definitions regarding “knowingly”, and “a” state agent. Does the standard for proving someone knowingly solicited a contribution require actual knowledge, or merely constructive or imputed knowledge? How is it proven what the solicitor knew at the time of the solicitation? Also, as written, “a” state agent implies “any” state agent, which will make plausible the following: Legislator X receives a campaign contribution from a friend, whose wife happens to work as an administrative assistant for Financial Group Y. The SIC has in the past and probably in the future, purchased securities from Financial Group Y. The Attorney General may determine Legislator X committed a felony, and the SIC may no longer use Financial Group Y as a broker.

Section 3 (A) states “...it is unlawful for an investment agent doing business with a state agent to make, directly or indirectly, a contribution...” to political candidates. What if the agent is a member of the advisory board of a charitable organization, and the organization decides to contribute to a political candidate who is in alignment with their goals and cause?

Section 3 (B) says: “...If an investment agent who is not doing business with the state has contributed to, has solicited any person or political action committee to make a contribution or has coordinated any contribution to a successful candidate for an office of a state agent that has authority over the investment of public funds or issuance of bonds, or that has the authority to appoint public officers who have that authority the investment agent shall not conduct business with the state...”

This section has several problems due to lacking legal definitions. How should ‘solicited’ or ‘coordinated a contribution’ be interpreted? Does this include suggesting to an investment agent that a candidate is worthy of a contribution? Discussing whether someone is a good candidate? Naturally this restriction will apply to contributions to not only legislators, but to board members of PERA and ERB, who have authority to change laws or appoint public officers with investment authority. This could be interpreted as preventing state employees at investment agencies from supporting a retirement board or legislative candidate. A state employee giving a campaign contributions will then not be allowed to “conduct business” with the state, which, lacking a definition could represent a necessary termination of employment.

Section 4 reads “...it is unlawful for a state agent to solicit any investment agent doing business with the state or seeking to do business with the state to: A. appoint a person to a position of employment; or B. hire a person on contract in any capacity.”

Unfortunately, “solicit” is undefined, which could be interpreted as broadly as to include a recommendation or even merely a citation as a reference by a state agent on a former state employee’s resume. This presents a potentially criminal problem should a state agent write a standard letter of recommendation for an employee or former employee who later uses that letter in an application for employment at a financial agency that has or is considering business with any state investment agencies.

## **OTHER SUBSTANTIVE ISSUES**

The AODA provided the following:

Section 3A of the bill states: that it is unlawful for an investment agent doing business with a state agent to make, directly or indirectly, a contribution to: a candidate for the elective office of a state agent or the candidate's campaign, but the bill does not appear to provide for a penalty for this particular violation.

The Governmental Conduct Act currently contains Section 10-16-17, Criminal Penalties, dealing with the penalties for existing violations of the act. In that section it states that, “Nothing in the Governmental Conduct Act shall preclude criminal prosecution for bribery or other provisions of law set forth in the constitution of New Mexico or by statute.” A prosecution under the proposed amendment to the Act might, according to Section 10-16-17, be followed by a prosecution for bribery involving a public officer. It is possible a court will find a conviction for both offenses will violate double jeopardy protections for twice convicting for the same conduct.

## **ALTERNATIVES**

The SIC recommends a Joint Memorial to send this issue to the Investments and Pensions Oversight Committee for further discussion, consideration and refinement.

## **POSSIBLE QUESTIONS**

1. Since the AGO is the sole agency with discretionary investigatory and prosecuting powers under the proposed statute, who will prosecute violations under SB 400, should perpetrators of these campaign contribution violations be employees of the AGO?
2. Will SB 400 include travel and hotel accommodation reimbursement by a conference host when a state agent speaks at said conference and represents New Mexico interests? The state will otherwise reimburse the employee for the costs, but if the conference was hosted by a financial partner of the state, will that be prevented under SB 400, thereby costing the State additional revenue?

3. The issue is the same for limited partner meetings, other due diligence visits and meetings for companies the state is already invested in and needs to monitor as part of its fiduciary responsibility. Do the provisions of this bill intend to prevent due-diligence trips, which are critical to evaluate potential investments?
4. It is the industry standard, sometimes contractually stipulated and also more logical for the company seeking or currently investing the state's dollars to pay oversight expenses to the agency. Does the bill intend to create a typical situation where the state is paying a great deal of money to analyze an investment that never gets made?

DW/nt